



Northern Ireland
Assembly

**COMMITTEE FOR
FINANCE AND PERSONNEL**

OFFICIAL REPORT
(Hansard)

**Consultation Report on the Construction
Contracts Bill**

30 September 2009

NORTHERN IRELAND ASSEMBLY

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FINANCE AND PERSONNEL**

Consultation Report on the Construction Contracts Bill

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Members present for all or part of the proceedings:

Ms Jennifer McCann (Chairperson)
Dr Stephen Farry
Mr Mitchel McLaughlin
Mr David McNarry
Mr Adrian McQuillan
Mr Declan O'Loan

Witnesses:

Mr Robin McKelvey) Department of Finance and Personnel
Mr Stewart Heaney)

The Chairperson (Ms J McCann):

I welcome Robin McKelvey, construction initiatives manager in the Central Procurement Directorate (CPD), and Stewart Heaney, deputy director of the construction advisory division. We are running late today, so please keep your introductory remarks short because members may have questions to ask.

Mr Robin McKelvey (Department of Finance and Personnel):

I take it that everybody has seen a copy of the report on the responses.

The Chairperson:

It has been included in members' packs.

Mr McKelvey:

I am not sure whether you wish me to go into any detail on it.

The Chairperson:

Please give us a brief overview.

Mr McKelvey:

We presented the proposal for a public consultation on 4 June 2008, which was agreed, and the Committee at that stage asked to be apprised of the outcome. A fairly disappointing number of responses were received, and only four of our questionnaires were returned completed. A further questionnaire, which was similar to the one used in GB, was returned in lieu, plus two responses that were simply comments from other representative bodies in the industry.

Generally, there was broad support for our proposals. There was a number of incidences in which some of the respondents offered some quite strongly expressed views. However, we feel that our proposals strike a balance. The industry is characterised by fairly diverse interests, and we are trying to get something that is in the middle and is balanced. I have a lot of information that I can provide.

The Chairperson:

We will take some questions and the issues can be explored.

Mr McNarry:

You are very welcome. You said that you were disappointed with the responses. Does that give you a sense that people are happy? How many responses did you expect?

Mr McKelvey:

Because of the history and circumstances of the legislation, it is not terribly surprising that there were a small number of responses. A separate consultation exercise was carried out in Scotland, and 13 responses were received. The last time England and Wales had a consultation, 71 responses were received, one of which was from Northern Ireland.

The original legislation in GB was the Housing Grants Construction and Regeneration Act 1996, which was followed in Northern Ireland by the Construction Contracts (Northern Ireland)

Order 1997, which, virtually word for word, replicated the GB provisions. I imagine because of the amendments that are being chased through Parliament at the moment in GB that a lot of people may be simply relying on the supposition that the same thing will happen here again; that whatever happens in GB will be replicated here.

Mr McNarry:

Let us take a step back. How many responses did you expect to receive, given that you said that the number you received was disappointing and low?

Mr McKelvey:

Seven or eight responses would have been a fair return for the population.

Mr McNarry:

Is anyone likely to moan later on and say that they did not know about it?

Mr McKelvey:

No. All representative bodies in Northern Ireland are usually affiliated to larger national bodies in GB.

Mr McNarry:

Is it a case of seeing it through? It looks as though people are happy that you are following what is likely to happen in England and Wales. Will you be telling them that this is where we are, and asking them whether they are content with the situation?

Mr McKelvey:

Yes; it is a fair assumption that those who responded are happy that Northern Ireland is following what is likely to happen in England and Wales. However, the Northern Ireland Assembly could decide to do something different. We carried out a public consultation in good faith, and if there were alterations or changes that people wanted to make here; we would have to consider those. However, there is a strong case for trying to support equality across the whole of the jurisdiction, simply to proclaim the commonality of case law in the event of there being any disputes arising.

Mr McNarry:

That is useful. Did the Department carry out the consultation on an in-house basis?

Mr McKelvey:

Yes.

Mr McNarry:

So, you did not spend any money on consultants?

Mr McKelvey:

No.

Mr McNarry:

So, the expertise is there?

Mr McKelvey:

Yes.

Mr McQuillan:

How many questionnaires did you send out? If you were expecting only eight responses, you cannot have sent out many questionnaires.

Mr McKelvey:

There is statutory provision for that. We issued about 130 questionnaires. Many of them went to people whom we did not imagine would have any pressing interest in replying.

Mr McQuillan:

It was really then only a box-ticking exercise?

Mr McKelvey:

There are many representative bodies in the industry and individuals who are interested in the professions and the industry. They might have returned questionnaires but may have elected to rely on what they had done in making replies to GB or to rely on us to do the right thing anyway.

Mr McQuillan:

Could you put a cost on the exercise, even though it was done within the Department?

Mr McNarry:

A fiver?

Mr McKelvey:

I could not put a figure on it.

Mr Stewart Heaney (Department of Finance and Personnel):

We will come back to the Committee on that point.

Dr Farry:

Welcome gentlemen. I want to ask about the underlying rationale for the legislation. Is this simply good housekeeping on our part, as regards keeping up to date with legislation elsewhere? Have particular problems with contracts come to light in Northern Ireland in recent years that make this legislation central?

Mr McKelvey:

I cannot give you chapter and verse on the range of issues on which people have come to us and said that our legislation is defective. There is a housekeeping element in that, if we wish to retain commonality of the legal basis for normal commercial practice, then we would be keen to have the amendments enacted.

Dr Farry:

Are the adjudication functions in the case of disputed contracts conducted through the Department of Finance and Personnel?

Mr McKelvey:

No. It is very much a matter of operations between private contracting parties. A Government Department could be involved, but there would be no significance to it.

Dr Farry:

Is it like the reform of the tribunal system? There are amalgamations happening and consolidations under the Court Service. I wondered whether this is related to that in any shape or form.

Mr McKelvey:

To my knowledge, there is no direct link. This is simply a matter of trying to find some way of, as it were, creating a summary justice means of resolving disputes during the course of building contracts. If there were a whole series of issues in dispute, such as a building contract that might last for several years, which paralysed the entire process and had people withdrawing from...

Dr Farry:

Which body provides the adjudicators?

Mr McKelvey:

Anyone within the legal profession, any of the building professions, or a member of the Chartered Institute of Building, for example, can establish himself as an adjudicator by taking training.

Dr Farry:

Is it regulated in any way? Are there restrictions on who can and cannot do it?

Mr McKelvey:

There is no chartered body of adjudicators, but there are a number of professional bodies that can nominate and set standards. If one satisfies their requirements, one can be appointed as an adjudicator from their lists.

In setting up a contract, the two parties to that contract can agree the name of someone who will resolve disputes that might occur; or they can nominate a body that they can refer to subsequently. The main point is that resolution is made within 28 days of an adjudicator being appointed, and that decision can then be opened up again for litigation or arbitration when the final job certificate has been issued.

Dr Farry:

Are those adjudication results actionable through the courts if either of the two parties to the contract defaults?

Mr McKelvey:

Yes.

Dr Farry:

Presumably, the purpose of modernising the legislation is to reduce the number of disputes that go to court?

Mr McKelvey:

Yes. It will ensure that the facility, which has been very much welcomed in the industry as a whole, is as open as possible, and that it includes as many forms of contracts as possible.

Dr Farry:

Are the numbers of disputes that go to court monitored? Does the Department track those statistics?

Mr McKelvey:

No.

Dr Farry:

Presumably, the Court Service could readily provide that data?

Mr McKelvey:

Yes.

Mr McLaughlin:

I am interested in article 9(2) of the Order, which deals with the payment process. Who else, other than the payer, could issue the certification?

Mr McKelvey:

It could be an architect or engineer who is appointed as a supervising officer on a contract.

The intention is to ensure that the Department is not being overly prescriptive and is not infringing on the right of parties to devise whatever form of contracts they desire. The employer or contractor could be the person who determines the amount for a certificate, and the point at which payment is made could be when an invoice is issued or when a certain milestone in the contract is reached.

Mr McLaughlin:

Therefore, it would not necessarily be someone such as a quantity surveyor who would issue the certificate?

Mr McKelvey:

It could be a quantity surveyor, but it could also be either party to the contract or indeed a third party who is not privy to it.

Mr McLaughlin:

Could a building control officer issue the certificate?

Mr McKelvey:

No. I do not think that building control officers would have any role to play.

Mr McLaughlin:

Is this exercise an attempt to reduce the potential for disputes?

Mr McKelvey:

The purpose is to take the heat out of disputes.

Mr McLaughlin:

Exactly, or for purposes of adjudication —

Mr McKelvey:

Yes. It will allow parties to a contract who encounter problems to resolve those problems without the situation getting out of hand.

Mr McLaughlin:

Would the preliminary part of the contract negotiations identify who issues the payment notices? Would that be agreed at the start of the contract?

Mr McKelvey:

Yes. That person or body would have to be nominated in any contract.

There is also a fall-back position, and although we are discussing the updating of the Construction Contracts (Northern Ireland) Order 1997, there is also the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999. The default provision is mentioned in the legal framework, and it provides for instances in which a contract exists between two parties who, for example, have never heard of the legislation and through ignorance or design have decided to create a contract without including that provision. In the event of a dispute occurring in those circumstances, the provisions of the scheme come into effect, and those provisions — known as a 9(2) notice — are fairly onerous with respect to what can or cannot be done with respect to adjudication of disputes or setting up a regime for payment.

Mr McLaughlin:

Will that apply across the sector?

Mr McKelvey:

Yes. However, it will not apply to domestic contracts.

Mr McLaughlin:

No, I did not think that it would. In fact, I hope that it would not. *[Laughter.]*

In some cases the pair may not be in a position to make the valuation and could well be vulnerable to —

Mr McKelvey:

There is flexibility, and that flexibility is intentional.

Mr McLaughlin:

Thank you very much.

The Chairperson:

With regard to adjudicators' costs, the 'Report on the Responses' states that:

“the courts should have jurisdiction to decide the reasonableness of adjudicators' fees and expenses”.

How will that work in practice? Will there be standard fees and expenses, or will the courts always have to determine the costs?

Mr McKelvey:

There would not be a standard referral to the courts. That would happen only in the event of there being a serious and sudden dispute that could not be resolved between the parties by any other means. They would have recourse to the courts in the final analysis. However, it is not intended to be an item for routine referral to, for example, a Court Master for calculation of expenses. Also, there would not be any standard fee set, although there might be notions of what a reasonable amount might be depending, perhaps, on the difficulties of the case or the size of the job.

The Chairperson:

It sounds as though it would be more expensive if it were always referred to the courts to set adjudicators' fees.

Mr McKelvey:

No.

The Chairperson:

That would not be happening?

Mr McKelvey:

That would not be part of any routine proposal.

The Chairperson:

OK. Thank you very much for your presentation.